

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT LOFTUS)	
Claimant)	
VS.)	
)	Docket No. 217,417
INSTANT DELIVERY)	
Respondent)	
AND)	
)	
GRANITE STATE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Robert H. Foerschler dated July 24, 1998, wherein the Administrative Law Judge granted claimant benefits, finding that claimant had suffered accidental injury arising out of and in the course of his employment, and that timely notice had been given of the accident. Oral argument was held on February 16, 1999, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Stanley L. Wiles of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, John B. Rathmel of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board. In addition, at oral argument, the parties stipulated that claimant's car allowance was to be included in the computation of claimant's average weekly wage. The parties have stipulated that, if this matter is compensable, claimant has a 10 percent functional impairment to the body as a whole.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged?

- (2) What was claimant's average weekly wage on the date of accident?
- (3) Is claimant entitled to unauthorized and future medical benefits?
- (4) Is claimant entitled to additional temporary total disability compensation?
- (5) Is claimant entitled to interest on the Award and, if so, from what date?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 1996 Supp. 44-508(f) states in part:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

On July 25, 1996, claimant started working for Instant Delivery as a delivery driver. Claimant would contact respondent by radio from his car whenever he was ready to begin working. This generally would occur at approximately 7:30 a.m., when he would power up his radio and contact the Instant Delivery dispatchers. Claimant would receive assignments, including both pickups and deliveries, by radio. Claimant did not have a designated work area. He was simply available through the radio for assignment. Claimant generally worked from 7:30 a.m. to 6:00 p.m., Monday through Friday. Occasionally, claimant would work beyond 6:00 p.m. if additional deliveries were available. However, there were night delivery persons assigned to work after 6:00 p.m.

On the date of the accident, claimant was not working, as he was having his vehicle serviced at Western Auto in Mission, Kansas. He had informed the respondent of this, and advised he wasn't sure when he was going to be available for work. The work on

claimant's vehicle did not conclude until after 5:00 p.m. that day. Claimant alleges, after he got his car fixed, he contacted the dispatchers to let them know he was available. Claimant testified that a dispatcher by the name of David told him to go to Resource Net, a common waiting area, and that he may have something for him. Claimant understood he was not guaranteed a job, but was simply to go to Resource Net and wait for a possible assignment. Respondent disputes that claimant was sent to Resource Net.

Claimant left Western Auto in Mission, Kansas, and, proceeding south on I-35, was involved in a motor vehicle accident involving claimant's car and at least two other vehicles. Claimant sustained injuries to his neck, shoulder and left arm, sustained a superficial cut on the bridge of his nose, and experienced pain in his upper back.

After the accident, claimant did not contact respondent to advise them that he had been in an accident, but instead helped police with the completion of the accident investigation report, and then proceeded to the Shawnee Mission Medical Center.

Claimant estimated that the original drive from Western Auto to Resource Net would have taken approximately 45 minutes. He obtained the keys for his van at approximately 5:20 p.m., and left Western Auto almost immediately. Claimant anticipated he would have arrived at the Resource Net location at approximately 6:30 p.m. had the accident not occurred.

Several times during the regular hearing claimant was asked whether his radio was on. When claimant was first questioned, he testified that the radio was off, but then later stated that the radio was on. He then testified that the radio was on, but during the accident became disabled, although he was not aware of this until after he left the hospital. Later, during cross-examination, claimant testified that the radio was actually on, and he was aware that it was disabled at the time of the accident. Then later, when questioned regarding why he did not contact respondent to tell them he had been in an accident, claimant testified that the radio was actually turned off or as he stated "logged off" at the time of the accident.

Claimant testified that he was paid both by commission and by the hour, claiming he was paid \$3.50 an hour over a 40-hour week. Records provided by respondent through the deposition of Warren Hutchison, the accounting manager with respondent, show that claimant was actually paid a 51 percent commission for every delivery he completed. Claimant was not paid by the hour. The records provided from respondent show both commission pay and a car allowance, which the parties have stipulated was part of claimant's wage. During the four weeks claimant worked for respondent, he was paid a gross pay of \$1,705.59. Respondent's representative testified that claimant was only paid for the deliveries he made, and there was no hourly pay.

The Appeals Board finds that claimant was not an hourly employee and was not being paid by the hour at the time of the accident.

In addition, the Administrative Law Judge stated that claimant was dispatched to Resource Net for a pickup. This is inaccurate. While claimant alleges he was told to go to Resource Net, there was no guarantee that claimant would have any work when he arrived.

The Appeals Board must, therefore, consider whether claimant's allegation that he was instructed to go to Resource Net is true, and if so, whether this would be sufficient for the Board to find that claimant was entitled to workers' compensation benefits. A vital element to this case is whether claimant had been dispatched to the Resource Net area for the purpose of obtaining either a delivery or a pickup. Claimant alleges he contacted respondent by his van radio at approximately 5:20 p.m., after his vehicle was fully serviced. Claimant then proceeded south on I-35 and, while traveling, was involved in the automobile accident. Claimant's job required that he be in radio contact with respondent whenever he wanted to obtain work. Claimant did not have a central business location to go to, but instead was contacted by radio. When claimant was asked if his radio was on at the time of the accident, he initially said no. He then modified his testimony several times. Finally, under cross-examination, when asked why he did not attempt to contact respondent after the accident to advise them of his problem and request assistance, claimant stated that the radio was actually "logged off." This would indicate that, at the time of the accident, respondent would have been unable to contact claimant even if it had a dispatch for him.

Two of respondent's dispatchers, Michael Dean Bishop and David Fisher, and also Mr. Hutchison, contradicted claimant's allegation that he was instructed to go to Resource Net for the pickup. Under normal procedures, if a delivery person worked all day, then he or she would be entitled to receive the evening dispatches, which paid at a higher rate than the daytime dispatches. It would be unusual for a driver who had not worked all day to be allowed this financial benefit. None of the dispatchers recall claimant contacting Instant Delivery on the date of accident and asking to be assigned either a pickup or a delivery. In addition, they testified that respondent generally has two on-call drivers who work with the night dispatcher, but usually there is relatively little work during that time.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his entitlement to the benefits by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g). Claimant's entitlement to benefits in this instance depends upon whether claimant was actually in the course of his employment at the time of the accident. Claimant's allegation that he was anticipating either a pickup or a delivery necessitates that the radio would have been on. However, claimant testified at various times either that the radio was on or was not on or was in some way disabled. The final testimony from claimant is that the radio was turned off or "logged off" at the time of the accident. Therefore, it would have been impossible for respondent to have contacted claimant, even were a pickup or delivery available.

The Appeals Board, therefore, finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with

respondent, and the Award of Administrative Law Judge Robert H. Foerschler dated July 24, 1998, should be reversed, and claimant denied benefits for the accident occurring on August 19, 1996.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 24, 1998, should be, and is hereby, reversed, and that claimant, Robert Loftus, is denied an award against respondent, Instant Delivery, and its insurance carrier, Granite State Insurance Company, for the alleged injuries of August 19, 1996.

This finding renders moot the remaining issues before the Appeals Board.

The costs associated with the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	\$304.85
Richard Kupper & Associates	\$317.50

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley L. Wiles, Kansas City, MO
John B. Rathmel, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director